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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS KANSAS CITY, MISSOURI SCHOOL DISTRICT AND AMERICAN FEDERATION OF TEACHERS LOCAL 691

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the lower courts, in a case of prolonged State-mandated racial segregation with devastating effects on the educational opportunities available to the plaintiff school children, acted within their discretion in refusing to terminate remedial educational improvement programs as "unitary" where they found that the defendant seeking termination had not shown (1) that the vestiges of segregation which such programs were designed to remedy had been eliminated to the extent practicable; or (2) that release of jurisdiction in these areas would not have adverse consequences on other admittedly non-unitary aspects of the school system; and where there was no evidence (3) that the defendant seeking such termination had demonstrated a good faith commitment to its constitutional obligation.

2. Whether the lower courts acted within their discretion to extend orders mandating that the State defendants help to maintain school district salaries at levels repeatedly found necessary to successful implementation of a largely voluntary desegregation plan, where the deplorably low original salaries were in part the result of the State's constitutional violation affecting school district funding.

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COUNTERSTATEMENT OF THE CASE

The Court described the background of this case in *Jenkins v. Missouri*, 495 U.S. 33, 37-45 (1990). This most recent petition [1] involves two longstanding elements of the desegregation remedy for Kansas City, Missouri public school students—educational improvement programs and employee salary funding—that the courts below repeatedly have found necessary to successful implementation of the desegregation plan. The educational pro-

[1] In this opposition, we cite the petition as "Pet." and the appendix attached to the petition as "App."

grams and salary relief are integral parts of a remedy that the lower courts have found is working, but has not yet eliminated to the extent practicable the vestiges of decades of racial segregation that the State of Missouri (the "State") mandated in the Kansas City, Missouri School District ("KCMSD" or the "District"). App. 112-13, 129-32. The State has asked this Court to review the lower courts' decision that the educational programs should not be terminated as "unitary," despite the established facts—which the State has never challenged as clearly erroneous—(1) that vestiges of segregation remain and can practicably be remedied; (2) that the termination of these programs would make it impossible for the defendants to comply with orders in other areas that the State has admitted are not unitary; and (3) that the State has made no showing of its good faith commitment to the district court's orders. App. 19. The petition also seeks review of the lower courts' long-settled factual conclusions that District employees' salaries near market levels are necessary to the success of the desegregation remedy and that the State's constitutional violation is in part responsible for the District's inability to produce sufficient revenues to maintain such salaries without assistance.

The Orders That Are The Subject Of The State's Petition

A. The Educational Improvement Programs

The first question in the State's Petition arises from its opposition to the District's motion to continue for the 1992-93 school year a series of long-standing educational programs that were part of the district court's original remedy in this case. The remedy was ordered because, in September 1984, after a 64-day trial, the district court (The Honorable Russell G. Clark) found both the State and the District liable for unconstitutionally segregating the schools of KCMSD and for failing in their affirmative duty to undo the harm of that segregation. Judge Clark found that the "inferior education indigenous of the state-compelled dual school system has lingering effects in the

Kansas City, Missouri School District," and that State-mandated segregation has resulted in the continued racial isolation of minority students. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1492-93 (W.D. Mo. 1984).

Judge Clark recognized "the frequent admonition from the Supreme Court to tailor the remedy to fit the scope of the violation," June 5, 1984 Order at 97, and that "the goal of a desegregation decree . . . is the elimination of all vestiges of state imposed segregation." *Jenkins v. Missouri*, 639 F. Supp. 19, 23 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986) (*en banc*). *cert. denied*, 484 U.S. 816 (1987). The most important vestiges he found were "a system wide *reduction* in student achievement in the schools of the KCMSD," *Id.* at 24 (emphasis in original), "low achievement" and a "general attitude of inferiority among blacks," 593 F. Supp. at 1492-93; racial isolation in the schools; and severe deterioration in the physical conditions of the schools.

On the issue of student achievement, the district court recognized the deficits in the education and basic skills of KCMSD students caused by prior segregation and the need for the remedy in this case to address them. The court cited with approval research by the Missouri State Board of Education stating that "because so many students have not mastered requisite skills thoroughly and because teachers must spend so much time helping them 'catch up,'" 639 F. Supp. at 28, the educational process for all students becomes unduly slow. The court then specifically found that "[the] education process has been further 'bogged down' in the KCMSD by a history of segregated education. Too often, as a result, a higher percentage of black students are among the lower achievers." *Id.* Segregation also harmed student achievement, Judge Clark confirmed, because as this Court held in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), segregation had "ruin[ed] attitudes" of students in KCMSD. 593 F. Supp. at 1492-93.

Judge Clark also found pervasive segregation remaining in these schools, where learning was so limited. Judge Clark found that "as of 1974, 20 years after *Brown I*, 39 schools were more than 90% black" and that "[e]ighty percent of all blacks in the District attended schools that were 90% black." 593 F. Supp. at 1492-93. By 1983-84, there were still "24 schools . . . racially isolated with 90+% black enrollment" and the dual school system had not yet been dismantled. *Id.* at 1493. The segregated system had caused the departure of whites to private schools and the suburbs. August 25, 1986 Order at 1-2.

Judge Clark further found that the school buildings in which this dual system operated had "literally rotted," *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 855 F.2d 1295 (8th Cir. 1989) (*en banc*), *aff'd in part and rev'd in part*, 495 U.S. 33 (1990), and that the lack of revenue that had caused this deterioration flowed directly from the State's failure to remedy its previous unconstitutional segregation: "[T]he State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools." *Id.* at 403. In affirming the latter findings, the Eighth Circuit expressly noted that the State's failure to remedy its unconstitutional conduct fostered further segregation: "The findings of fact demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." 855 F.2d at 1305.

Judge Clark found that desegregation in KCMSD could best be accomplished through a largely voluntary desegregation plan based on educational improvements, voluntary student transfers to specialized magnet schools, capital improvements, and voluntary interdistrict transfers.[2] The cornerstone of this voluntary desegregation remedy consisted of basic educational improvements, known among the parties as *Milliken II* programs because they generally are relief of the type that this Court first expressly approved in *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"). They include additional teachers to reduce class sizes, counselors, librarians and library materials to meet State AAA-rating requirements, a full-day kindergarten program, an early childhood education program, an extended school day in selected schools, and a summer school program. The Eighth Circuit has repeatedly recognized that these programs have three complementary goals: (1) to remedy the systemwide reduction in student achievement by improving the education available to the plaintiff school children; (2) to reverse the pattern of decreasing non-minority enrollment by attracting back white students from private and suburban schools; and (3) to bring about a voluntary redistribution of children within the KCMSD. App. 18; *Jenkins*, 855 F.2d at 1302.

When KCMSD filed a motion to renew the *Milliken II* programs for 1992-93, the State argued that each program individually must be declared unitary because, under its interpretation of *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), the proposed programs had been implemented in previous years, in compliance with the district court's prior orders. On the other hand, the State also argued that several of these same programs should be terminated

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[2] The State did not appeal Judge Clark's determination that the State and KCMSD had failed to remedy the effects of their unconstitutional segregation. Neither did it appeal "substantial portion[s]" of the remedial order, including the implementation of the educational programs designed in part to remedy the systemwide reduction in student achievement in KCMSD. *Jenkins v. Missouri*, 807 F.2d 657, 682 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987).

because they were ineffective. The State subsequently stipulated to the scope of the proposals and to the budgets for more than half of the *Milliken II* programs, while reserving its argument that they were unitary.

Judge Clark conducted an evidentiary hearing on KCMSD's motion. The District's evidence addressed the need for the particular programs for which there was no stipulation with the State. Anticipating a possible attempt by the State to demonstrate partial unitary status (despite the fact that the State had filed no motion seeking such relief), the District also presented evidence that while racial isolation was decreasing and student achievement was improving in the KCMSD, additional progress in remedying the vestiges of segregation previously identified by the district court was both necessary and practicably attainable. KCMSD also presented evidence that all of the *Milliken II* programs were integrally related to each other and to the rest of the remedy; for example, the magnet plan could not function successfully without the basic educational improvements. In contrast, the State's single *Freeman* witness testified only (1) that the defendants had complied with the court orders in this area; (2) that the level of certain educational resources was higher in the KCMSD than in some surrounding school districts; and (3) that the quality of educational opportunities in the KCMSD had "improved." The State offered no evidence to suggest what the effect of the resources provided had been, just that opportunity had improved because the resources were greater. Indeed, the State's principal witness conceded that he had said nothing about the *results* of the educational improvement components of the remedy in terms of desegregation or student achievement. The State offered only conclusory—and illogical—testimony that the *Milliken II* relief in this case is not integrally related to other aspects of the remedy because the orders developing the deails of the various remedial components were entered at different times. The State offered no evidence at all about its commitment to the goals of

the court-ordered remedy. The State's other witnesses testified that certain programs that the State claimed were partially unitary were also ineffective. *See* App. 70 ("State objects that this [extended day] program is not attracting non-minority students"); ("State objects that the effective schools program has not been successful in improving student achievement").

At the hearing, Judge Clark rejected from the bench the State's argument that *Freeman* required a declaration of partial unitary status with respect to each previously implemented educational improvement program regardless of whether actual desegregation or progress in student achievement had been accomplished to the extent practicable. App. 11. He also rejected most of the State's factual contentions concerning the alleged ineffectiveness of particular programs, and ordered the continuation of most of them. App. 70-72.

Related orders that the State has not made the subject of the Petition illuminate the court's conclusion that these programs are not yet unitary. While the State's appeal on the partial unitary status question was pending, Judge Clark held a three-week hearing concerning the proposed continuation of the magnet school component of the remedy. Judge Clark found that the progress in desegregating KCMSD's student enrollment has been "substantial." App. 129. Judge Clark found that KCMSD had eliminated segregation in "all fifteen elementary schools that had suffered the most intense racial isolation," made progress in integrating secondary schools (some of which had "achieved high levels of integration"), and "substantially improved" on an index of desegregation in the schools. *Id.* Judge Clark also found, however, that more desegregation progress was necesary and practicably attainable. *Id.* Likewise, he specifically found that while "there has been a trend of improvement in academic achievement in the KCMSD, . . . the District has [not] reached *anywhere close* to its maximum potential." App. 131 (emphasis added).

Shortly thereafter, KCMSD requested continuation of the *Milliken II* programs for 1993-94 and 1994-95. The State once again argued in its opposition, without filing a motion, that these programs were unitary and that the State's funding obligation should end. At a one-day hearing, much of the evidence again was limited to factual issues on certain specific programs. The District also presented evidence of the need for continued progress in improving educational quality and actual desegregation. The State presented no live witnesses at all to support its *Freeman* argument. Its only affirmative evidence on that issue was an affidavit from the same witness who had testified in support of unitariness at the 1992-93 hearing. This affidavit, a fair summary of *all* the record evidence in support of the *State's* argument, merely reiterates that the various *Milliken II* programs had been "fully implemented," had made more resources available in KCMSD, and in many instances had brought these educational inputs to a level equal to or higher than some neighboring school districts. The State's affidavit was silent on the State's good faith, the inter-relatedness of the various remedial programs, and whether the remedy had succeeded in eliminating the vestiges of segregation to the extent practicable in KCMSD. Judge Clark again rejected the State's argument:

> The *Milliken II* component is an integral part of the overall desegregation remedy and the Court finds that the State's arguments that these components have attained unitary status are unpersuasive. The State should not be heard to complain that the desegregation plan is a complete failure on the one hand and that the *Milliken II* components are completely successful on the other. The Court finds that the State has made fundamentally flawed arguments in pursuit of an order determining unitary status in the KCMSD. The Court does find that the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy. However, these components have not yet met these goals in their entirety. The Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time. [App. 112-13.]

The Eighth Circuit affirmed the district court's findings that the State had not met its burden of establishing partial unitary status under *Freeman,* noting that the evidence established *at most* that a start had been made in eliminating the vestiges of segregation in the District. App. 19. The court concluded that the "evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable." *Id.*[3] The Eighth Circuit concluded that another reason the State was not entitled to be released from its obligations is that it had failed to meet, indeed failed even to address, two other criteria set forth by this Court in *Freeman*: "whether retention of judicial control [over the educational improvement programs] was necessary or practicable to achieve compliance with the decree in other facets of the school system," and whether "[t]he State . . . has demonstrated a good faith commitment to the whole of the court's decree." *Id.*

The State failed in an attempt to secure rehearing or rehearing *en banc*. Even the dissenters from the denial of rehearing *en banc* noted that the State had not made an adequate record to support its *Freeman* argument:

> Whether the KCMSD has actually achieved partial unitary status in the quality of its educational program imposed by the desegregation plan is, perhaps,

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[3] Two months later, in considering the State's second appeal on the question of partial unitary status, which is not a subject of this petition, the Eighth Circuit concluded that this inadequate record had not been supplemented in any meaningful way and reaffirmed its conclusion that the State had not shouldered, let alone carried, its burden of proof on the relevant issues. *Jenkins v. Missouri*, No. 93-3975, slip. op. at 4 (8th Cir. May 3, 1994).

still an open question on the record before us today. [App. 58 (emphasis added).]

The educational programs for 1992-93 that the State challenges in this Petition were provided during that school year. They were fully funded by KCMSD and the State and those orders have now been fully implemented.

B. Maintaining Salaries Near Market Levels

The second question the State raises in its Petition concerns orders affirmed by the Eighth Circuit that require KCMSD's salaries to be maintained near market levels. These orders stem from Judge Clark's requirement that KCMSD not divert resources away from its baseline education efforts to fund special desegregation programs. In 1987, Judge Clark found "that the KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program." 672 F. Supp. at 410 (citations omitted). He further observed that the competitive position of the KCMSD regarding salaries "ha[d] deteriorated significantly" and that "[c]onsequently, KCMSD's ability to attract new teachers and retain present teachers has been restricted." *Id.* The court approved the expenditure of $7.147 million of desegregation funds for each fiscal year until 1991-92 "to fund teacher salary increases." *Id.* The State appealed the September 15, 1987 order, and challenged on appeal the scope of the capital improvements plan and the court-ordered tax increases to permit the District to raise revenue toward funding some of the costs of desegregation. However, the State did not raise in either of its briefs on that appeal the approval of funding for salary increases for the 1987-88 through 1991-92 school years, and the Eighth Circuit left that portion of the order undisturbed. In 1990, following a court-ordered study of how KCMSD salary rates affect the desegregation plan, a settlement was reached among all of the parties, authorizing the KCMSD to use desegregation funds to maintain minimally adequate salaries over the next two-year period.

The result of this relief is that salary increases required to pay KCMSD personnel at roughly competitive rates are funded through what is known as the "desegregation budget." KCMSD functions with a separate desegregation budget because it is required by court orders to share desegregation costs with the State,[4] but early on it became clear that KCMSD did not have sufficient revenue to fund its full share without undermining the quality of its basic educational program and, as a result, the voluntary desegregation remedy itself. 672 F. Supp. at 410. For that reason, and because the District's inability to raise sufficient funds was itself partially a product of the State's acts of illegal discrimination, *see supra* page 4, Judge Clark concluded he had no choice but to order extraordinary funding relief, including increasing the District's property tax levy. On appeal, the Eighth Circuit modified the district court's order to enjoin certain State laws and to permit local authorities to increase KCMSD's property tax. 855 F.2d at 1314. This Court held that the district court had exceeded its equitable powers by directly increasing the property tax rate, but that the tax increase as modified by the Eighth Circuit satisfied equitable and constitutional requirements. *Jenkins,* 495 U.S. 33. As a result of these orders, the desegregation budget is funded from KCMSD's desegregation tax levy and from payments the State makes under court order. All desegregation budget expenditures must be ordered by the district court. In contrast, the operating budget is funded from various State, local and federal sources (as in any other school district in the State), and its expenditures fund most of the basic operating costs of the District. Over the years

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[4] *See, e.g.*, 639 F. Supp. at 43-46; 593 F. Supp. at 1506 ("much of the costs . . . [of] implementing a plan to dismantle the vestiges of the dual school system in the KCMSD should be borne by the State").

however, KCMSD has frequently suffered operating budget deficits that have required substantial cuts in these expenditures because the amount of operating revenue from local as well as State sources is fixed under State law. *Jenkins*, 495 U.S. at 38-39.[5] Judge Clark has repeatedly found that KCMSD's operating revenues have been insufficient to fund new obligations, such as raising salaries to keep pace with inflation or funding a larger portion of the desegregation remedy.[6]

In early 1992, the KCMSD, the American Federation of Teachers Local 691 ("AFT"), an intervenor in this case, and the plaintiff school children all sought continued desegregation salary relief. App. 76. The State, however, proposed that salaries be rolled back to their 1986-87 levels. App. 83. The State's approach would have caused starting salaries for teachers to fall from "$22,215 to just over $17,000" because of the financial limitations on the District discussed above. App. 79. After a four-day hearing, Judge Clark expressly reaffirmed his earlier fact finding that support for District salaries is essential for desegregation. App. 88. He concluded that "the basis for this Court's ruling is grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD." App. 90. "Logic and empirical data show that in the absence of desegregation funding for salaries, the District will not be able to implement its desegregation plan." App. 86. Judge Clark did not limit

[5] The District has virtually no ability to increase its operating budget revenues; most of KCMSD's revenue sources are dictated by State law and are outside of the District's control. *Id.* Because the court-authorized tax increases are solely for desegregation budget purposes, KCMSD has been unable to raise additional operating budget revenues through local property taxes. As a result, the operating budget portion of the KCMSD levy is about half that of neighboring Missouri school districts, although the total levy is one of the highest in the region.

[6] *See, e.g., Jenkins*, 672 F. Supp. at 410; August 25, 1986 Order at 3; *Jenkins*, 639 F. Supp. at 44-45.

his findings to the need for high quality teachers and other instructional personnel: "In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators and *staff*." App. 90 (emphasis added). Judge Clark concluded his order by stating in the strongest terms why he was rejecting the State's drastic alternative:

> The State's proposal would cause severe harm to the desegregation effort. It is critical to the success of the desegregation plan that the employees who carry it out are compensated at or near the relevant market rates of compensation so that the District can attract and retain employees with the training and experience necessary to implement the Court's plan. A salary roll back would result in excessive employee turnover, a decline in the quality and commitment of work and an inability of the KCMSD to achieve the objectives of the desegregation plan. [App. 91.]

In early 1993, the AFT and KCMSD again developed separate proposals for salary relief. After a three-day hearing in June of 1993, Judge Clark characterized the evidence presented as "strikingly similar" to the last year's evidence on the salary issue. App. 95. He thus found no basis to alter his previous findings. He again expressly found that the "evidence presented at trial reaffirmed the position that the support personnel of the district are critical to the successful implementation of the desegregation program." App. 104. On the basis of the findings, he ordered continuing salary relief, which left District salaries "roughly competitive" to, but still as much as 7-28% below, salaries paid by competing school districts to teachers with comparable levels of experience and education. App. 102; AFT Exhibits 22, 23 and 24, Hearing of June 1, 1993.

The Court of Appeals affirmed both of the district court's orders approving salary relief as part of the desegregation plan, on two grounds. First, the court af-

firmed the district court's fact finding, based on the extensive evidence before it, that desegregation funding to maintain KCMSD salaries at or near market levels was "essential to comply with the court's desegregation order." App. 34. In addition, the Eighth Circuit reiterated its prior conclusion that the State's failure to remove the vestiges of the dual school system in KCMSD had contributed to the District's inability to raise sufficient funds to operate the school system, including paying adequate salaries. App. 26, 30-31.

The State also unsuccessfully sought rehearing or rehearing *en banc* of the salary issue. Again, not only was review denied, but even the dissenters from the petition for *en banc* review indicated that they would affirm the district court's orders concerning salaries for "teaching and direct educational support personnel" (about 80% of the salary relief). App. 57.

REASONS FOR DENYING THE WRIT

The Court should deny the petition in this case for three reasons. Petitioners' first stated issue is not raised by this case at all. The State claims that the decisions below create an arbitrary requirement of certain test score results as a prerequisite to a declaration of partial unitary status, when in fact the lower courts said no such thing. Rather, the courts below carefully applied the standards recently articulated by this Court in *Freeman*, 112 S. Ct. 1430.

Second, the decisions below rejected the State's argument for partial unitary status for reasons that are fact-specific. Indeed, the Eighth Circuit's decision held only that the State had failed to meet its burden of proving (1) that the vestiges of segregation addressed by the *Milliken II* relief in this case have "been eliminated to the extent practicable"; (2) that retention of judicial control of the educational improvement programs is

neither "necessary or practicable to achieve compliance with the decree in other facets of the school system"; and (3) that the State "has demonstrated a good faith commitment to the whole of the Court's decree." App. 19 (*quoting Freeman*, 112 S. Ct. at 1446). The State purports to raise issues challenging what it terms the "unprecedented educational, financial and physical resources that have been provided," to the plaintiff school children. Pet. i, 4-6, 12, 14-15. The majority of those resources, however, have funded a program of extensive capital improvements and a magnet school plan, which are not addressed at all in the orders under review. This Court denied certiorari seven years ago on the State's challenge to the district court's authority to order the capital improvements plan, 484 U.S. 816 (1987), and four years ago on the State's challenge to the scope and specific details of the magnet school and capital improvement plans. 490 U.S. 1034 (1989).

Finally, the salary relief ordered in this case presents no novel legal questions and rests on fact findings made and affirmed repeatedly over the last seven years. Since 1987, the lower courts have repeatedly found that to cure the vestiges of student segregation in KCMSD, the District must attract and retain employees competent to implement the court-ordered plan. The courts further found that in order to have such employees, salaries must be maintained near market levels and that the State's constitutional violations have restricted the District's ability on its own to produce revenues sufficient to meet its basic obligations (like paying adequate salaries) and to fund its share of the desegregation remedy. The State has not challenged any of the fact findings as clearly erroneous, and none of these fact-specific issues merits reconsideration by this Court.

I. THE PETITION PRESENTS NO NOVEL LEGAL ISSUE OR SPLIT AMONG THE CIRCUITS, BUT INSTEAD INVOLVES FACT-SPECIFIC ISSUES GOVERNED BY SETTLED LEGAL PRINCIPLES THAT THE COURTS BELOW CAREFULLY FOLLOWED

A. The Lower Courts Properly Applied This Court's Standards for the Determination of Partial Unitary Status and Did Not Create a Requirement of Certain Standardized Test Scores

This Court in *Freeman* authorized district courts to exercise their discretion to withdraw supervision from general areas of school district operations only where: (1) "the vestiges of past discrimination [in that area] have been eliminated to the extent practicable," 112 S. Ct. at 1446 (quoting *Dowell,* 111 S. Ct. at 638); (2) "there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn," *id.*; (3) "retention of judicial control is [not] necessary or practicable to achieve compliance with the decree in other facets of the system," *id.*; and (4) the defendant "has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Id.* The Eighth Circuit's decision recognizes each of these standards and correctly holds that the State failed to carry its burden of proof on three of these four issues. App. 19.

According to the State, however, the Eighth Circuit added a new requirement of "increased student achievement, as measured by results on standardized test scores" to these standards. Pet. 2. In fact, the panel opinion nowhere mentions the words "standardized test scores" or "test scores" and assiduously follows the analysis described by this Court in *Freeman.* The State itself manu-

factured the alleged student-achievement-as-measured-by-tests-scores standard—which it mentions no fewer than twenty times in its petition—out of one general sentence of dicta in the panel opinion. Pet. 8. Having rejected the State's partial unitary status argument because the record below demonstrated compliance, but failed to show that any of the other *Freeman* standards had been met, App. 19, the Eighth Circuit offered some further guidance to the parties:

> In view of the State's arguments that under *Freeman* it is entitled to a determination on an incremental basis that KCMSD had became unitary, *a few further words are appropriate.* . . . When the question of quality of education is reached the issue is far more complex. The district court correctly observed that implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent practicable. *The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation.* [App. 20-21 (emphasis *added*).]

The last sentence in the quoted passage, taken out of context, is the only textual basis for the State's extrapolation that the panel imposed an arbitrary test score standard for partial unitary status. Pet. 8. In contrast, the Eighth Circuit, in its later opinion denying rehearing *en banc,* expressly disavowed rigid reliance on test score results:

> Test scores, however, *must be only one factor in the equation* [for determining whether past discrimination has been remedied]. Nothing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs

should be ended by a declaration they are unitary. [App. 48 (emphasis added).][7]

A fairer reading of the Eighth Circuit's statement that the "success of quality of education programs must be measured by their effect on the students" is a reaffirmation of the well-settled principle that *effectiveness* in eliminating vestiges of discrimination is the standard to be employed in assessing a school desegregation remedy. *See Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971).[8] This Court held

[7] In explaining his reasons for rejecting the State's claim that these programs should be ended, Judge Clark did not focus primarily on test scores either. App. 11, 112-13. The district court, in its later order renewing the magnet plan for two years, found that KCMSD is still at a reduced level of student achievement "at or below national norms at many grade levels." The State overstates the context of this narrow factual finding; the State claims that "the [d]istrict [c]ourt had stated, in dictum, that . . . the KCMSD could not be declared partially unitary 'because the District is still at or below national norms at many grade levels.'" Pet. 8 n. 4. Judge Clark, however, did not link the test results below national norms with a failure to achieve partial unitary status, as the State implies. App. 131. Indeed, the State had not even argued that the magnet plan was partially unitary. The quoted finding was made in response to the *State's evidence* that the magnet plan had not resulted in sufficient progress to justify its continuation; "the studies conducted by the State are reliable but not to the extent necessary to draw the doomsayer's conclusions reached by the State with respect to the magnet program." App. 132.

[8] Moreover, there is no doubt in the lower courts that this well-settled principle applies to unitary status determinations. The Tenth Circuit agrees that *Freeman* and *Dowell* in no way suggest a "retreat from the principle that the measure of any desegregation plan is its effectiveness." *Brown v. Bd. of Educ.*, 978 F.2d 585, 588 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1993) (quoting *Davis v. School Comm'rs*, 402 U.S. 33, 37 (1971)). The Eleventh Circuit as well, in another post-*Freeman* decision, concurred that the defendant "has the burden of proving . . . that

early on in *Raney v. Board of Education*, 391 U.S. 443 (1968), and recently reaffirmed in both *Dowell* and *Freeman*, that a release of jurisdiction upon a showing merely that a school district adopted a remedial plan would "be inconsistent with the responsibility imposed on the district courts by *Brown II*." 391 U.S. at 449 (citations omitted).

The State relies on dicta from *Swann* to the effect that no "particular degree of numerical racial mixing" is required and suggests that effectiveness is not the appropriate standard. Pet. 14 (*quoting Swann*, 402 U.S. at 24). The State's quotation is accurate but irrelevant, because no particular degree of racial mixing or student achievement has been required here. The actual holding of *Swann* is far more instructive; this Court held that the district courts' limited reliance on mathematical ratios to address segregated student enrollment patterns was within its discretionary powers. "Awareness of the racial composition of a school system" was a useful starting point, the Court held, because ultimately a "remedial plan is to be judged by its effectiveness." *Swann*, 402 U.S. at 25. In this case, the lower courts have merely reiterated this standard; the remedial programs must "be measured by their effect," here their effect on both student enrollment and educational quality. App. 21.

The standard for judging a desegregation remedy is not, as the State suggests, merely whether the remedial plan violates or "fails to satisfy the Fourteenth Amendment," Pet. i, but whether it puts the victims of unconstitutional conduct as nearly as reasonably possible in the position they would have been but for the constitutional violation. Indeed, the "settled equal protection jurisprudence" that the State claims to marshal in support

it has eliminated the vestiges of its dual system to the extent practicable." *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1425 (11th Cir. 1992).

of its petition deals only with the question whether an injury sufficient to be the basis for liability under the Fourteenth Amendment has been alleged and not the distinct legal issue of whether adjudicated constitutional injuries have been cured to the extent practicable. *See* Pet. 13, 17-18, 21. The defendant seeking unitary status bears the burden of coming forward with evidence establishing that such injuries have been remediated to the extent practicable. *Freeman,* 112 S. Ct. at 1444-45.

As further demonstrated below, the State offered no proof that the *Milliken II* programs had succeeded in eliminating any of the vestiges of segregation found in this case—by any measure—and, therefore, the lower courts had no occasion to offer anything more than general guidance about what proof ultimately might be sufficient to establish that such vestiges have been removed. Moreover, the currently unpresented question of whether it might be appropriate *in this case* to require the defendants, as part of their obligation to eliminate the vestiges of segregation to the extent practicable, to raise the level of academic achievement in KCMSD would be *sui generis* because of the unique finding here of "a system wide *reduction* in student achievement" caused by the original constitutional violations. This unchallenged finding of an overall deterioration in the education of all children in the District ultimately may present the lower courts here with a more difficult factual question regarding the level of elimination of vestiges that is required and is practicable, than that posed in most other school desegregation cases. That issue, however, is simply not presented by the orders on review here. This Court, therefore, should not grant certiorari to review the State's hypothetical standardized-test-score requirement, which the lower courts did not impose.

B. The State Failed To Move the District Court for a Declaration of Partial Unitary Status or To Carry Its Burden of Proof on Several Critical Issues, and the Rejection by Both Lower Courts of the State's Argument on Those Fact-Specific Grounds Raises No Issue Meriting This Court's Review

As demonstrated above, the first issue raised by the State is a false one. What the State truly attacks are the findings that it did not carry its burden of proof with respect to the standards set forth in *Freeman.* But nothing in those findings presents an issue meriting this Court's review. The State cannot show—indeed has not even argued—why this Court should abandon its rule against disturbing the findings concurred in by both courts below.[9]

Moreover, this Court left no doubt that partial relinquishment of judicial control in a school desegregation case is only appropriate "where justified by the facts of the case." *Freeman*, 112 S. Ct. at 1445. The State, however, failed in the district court to move for a declaration of unitary status, to allege that this Court's standards for the partial relinquishment of judicial control were met, or even to try to carry its burden of proof with respect to those standards. Instead, the State argued below that the "establishment of the programs by compliance with the court order is all that is required." App. 19. The State limited its evidence to the fact that it had complied with prior court orders by providing part of the funds necessary to enable the District to purchase educational resources such as books, teachers, librarians, and counselors and to

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[9] This Court has repeatedly held that it will not disturb findings of fact concurred in by both a district court and court of appeals. *See, e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317 n. 5 (1985); *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 n. 15 (1987); *Washington Area Transit Auth. v. Johnson*, 467 U.S. 925, 928 n. 5 (1984); *Rodgers v. Lodge*, 458 U.S. 613, 623 (1982). Here the district court and Court of Appeals have concurred in *all* of the relevant factual findings on both the *Freeman* issues and the salary relief at least *twice*.

offer educational programs such as early childhood and summer school. The State also compared the resources provided in KCMSD to several neighboring school districts. However, the State presented no evidence that the programs were effective to eliminate the harms that they were designed to address.

The State misses one of the fundamental tenets of school desegregation law reaffirmed by this Court in both *Freeman* and *Dowell*. Defendants in school desegregation cases have an affirmative duty to remedy their constitutional violations by eliminating the harms that they have caused:

> The district court should address itself to whether the Board ha[s] complied in good faith with the desegregation decree since it was entered, *and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable*. [*Freeman*, 112 S. Ct. at 1446 (quoting *Dowell*, 111 S. Ct. at 638) (emphasis added).] [10]

The State, however, did not even allege, let alone attempt to prove, that the educational harms or racial isolation caused by State-mandated segregation in the KCMSD had been eliminated to the extent practicable.[11] The State's evidence did not mention the "system wide *reduction* in student achievement," the "low achievement" among

[10] *See Freeman*, 112 S. Ct. at 1443 ("duty . . . to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system"), *id.* at 1445 ("end purpose must be to remedy the violation"); *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237, 249-50 (1991) ("District Court should address . . . whether the vestiges of past discrimination had been eliminated to the extent practicable").

[11] Unquestionably, the *Milliken II* programs in this case are designed to address the legacy of segregation in both of these areas. *See e.g., Jenkins*, 639 F. Supp. at 24, 27, 29, 31 (educational programs ordered in part to remedy educational harms). *See also id.* at 27, 29, 31, and 35 (educational programs ordered will help in "attracting and maintaining non-minority student enrollment").

minority students, the "general attitude of inferiority among blacks," or the level of racial isolation in KCMSD. *See supra*, page 3. Indeed, despite claiming partial unitary status under *Freeman*, the State objected (unsuccessfully) to the *relevance* of the evidence presented by the District concerning the levels of racial isolation and academic achievement in KCMSD. Because it so completely misunderstood *Freeman*, the State made no record that would allow this Court a meaningful review of whether the KCMSD is partially unitary. Even the dissenters from the denial of rehearing *en banc* noted that is "still an open question on the record before us today." App. 58.

The State confuses the issue in telling this Court that "no party contested the State's showing that the overall quality of education programs the KCMSD offered was equal to or better than analogous programs offered in any surrounding Missouri suburban school district." Pet. 14.[12] First, the State made no such showing; its evidence addressed the level of certain basic resources but did not address the "quality" of the programs offered in any other way. Indeed, while the State has fully accredited *all* of

[12] Likewise, the State repeatedly quotes the district court's statement that the KCMSD has "facilities and opportunities not available anywhere else in the country," *see, e.g.*, Pet. i, and claims that it is a factual finding of the district court. Ironically, unlike the lower courts' actual findings, which undercut the State's claimed legal issue so completely, this statement is unsupported by any evidence in the record. This statement is hyperbole used by the district court in the midst of a passage aimed at encouraging the non-party City government to do more to provide security for KCMSD's buildings and equipment. There was no evidence submitted to the court, however, comparing these physical facilities to those in McLean, Virginia or any other school district in the nation, and this discussion does not refer to the educational programs at issue here at all. App. 115. The State's characterization of this statement as a "finding" based on "uncontroverted evidence" about the district court's "standards" concerning education quality being "vastly exceeded", Pet. 7, is totally without foundation.

the other ten school districts in the Kansas City area that it has evaluated—based on the level of educational resources they provide as well as other measures of the quality of their programs—it has only provisionally accredited KCMSD, the State itself finding significant deficiencies in educational quality measures. Second, KCMSD's evidence clearly showed that, while the District has improved its educational quality and desegregation levels, more progress is necessary to put the victims of segregation in the position they would have been but for the constitutional violation. App. 112-13, 131. The District's evidence included, among other things, statistics on student enrollment and historical data on student performance according to a number of indicators.

The State's Petition itself repeatedly betrays the fact-specific nature of the decisions below and the inadequacy of the record below for review of the question that the State asks this Court to consider. For example, the State argues that reliance on student outcomes to assess whether vestiges of segregation have been eliminated to the extent practicable is "[f]actually . . . untenable because factors outside the control of government and unrelated to *de jure* segregation dramatically affect student achievement." Pet. 19. The State, however, failed to present a scintilla of evidence to the district court about what factors in the KCMSD, unrelated to past discrimination, have contributed to disappointing student performance or continuing racial isolation. In essence, the State seeks through law review articles cited to this Court to make the record it failed to make below. Pet. 20 n.10.

This is not a case, therefore, like *Freeman*, where a defendant has proven that the condition adversely affecting the plaintiffs was caused by factors outside its control. Just as demographic changes in DeKalb County, Georgia, contributed to ongoing racial imbalances in public school enrollments, 112 S. Ct. at 1438, social and economic forces in Kansas City, Missouri *may* contribute to educational problems in KCMSD, but whether they are now the cause of low student achievement, continued racial

isolation, or other conditions previously found to be vestiges of segregation are questions of fact not yet considered by the courts below. The State, which bore "the burden of showing that any current [harm] is not traceable, in a proximate way, to the prior violation," 112 S. Ct. at 1447, did not present any proof on this issue.

The spectre that the State conjures up of a potentially perpetual remedy need not inhibit the denial of review of these fact-bound issues.[13] Despite the district court's finding that the remedy has not yet succeeded in eliminating the vestiges of segregation to the extent practicable, it already has directed the parties to plan for the operation of the KCMSD when the defendants are released from court jurisdiction. App. 140-141. Recognizing the unique issues presented by the District's financial situation and the significant progress of the remedy to date, the district court has ordered the parties to consider effective methods for funding KCMSD once the vestiges of segregation are eliminated to the extent practicable and court jurisdiction ends. *Id.* Proceedings are in progress in the district court analyzing the implications of a KCMSD financial plan, assuming withdrawal of court-ordered funding at alternative intervals of three, five, seven or ten years. App. 141.

This State also challenges the determination of the courts that it is necessary for the district court to retain jurisdiction over the educational programs that the State claims are unitary in order to ensure compliance with the court's decree in other areas that the State concedes are not. App. 19. This issue too does not merit this Court's review. As this Court has recognized, "[t]wo or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area

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[13] The State claims that a KCMSD administrator "endorsed" a 100-year remedy, Pet. 22, where in fact the witness testified in response to a series of leading questions on cross examination simply that the length of time was less significant than whether the violation had been cured.

cannot be eliminated unless the judicial remedy addresses other matters as well." *Freeman*, 112 S. Ct. at 1449 (citations omitted). The voluntary remedy here, premised on desegregating student enrollment by improving educational quality, is the quintessential example of such synergism. It makes no sense to consider eliminating the *Milliken II* relief ordered in this case while vestiges of segregation in student enrollment persist; these educational programs are the foundation of the magnet school plan and the cornerstone of the overall plan to remedy the vestiges of segregation. *See, e.g.*, 639 F. Supp. at 27, 29, 31, 35 (importance of remedial education components "to attracting and maintaining, non-minority student enrollment"). The State's evidence, for example, failed to suggest how the magnet school plan could possibly be effective in attracting non-minority students to KCMSD if the District's class sizes increased substantially, as the State proposed. Judge Clark has found and the Eighth Circuit confirmed that the remedial programs form an integrated whole and eliminating any one would have serious consequences for the others. App. 112, 19. Thus, even if the lower courts had misapprehended this Court's guidance concerning the elimination of the vestiges of past discrimination in the area of educational quality or if the State had proved that no such vestiges remain—neither of which occurred—this case would not merit review because the State clearly failed to meet this independent requirement for partial unitary status.

Similarly, the State failed to allege or prove that it "has demonstrated a good faith commitment to the whole of the court's decree." App. 19 (citing *Freeman*, 112 S. Ct. at 1446). The Tenth Circuit recently elaborated *Freeman*'s good faith requirement:

> Mere protestations of an intention to comply with the Constitution in the future will not suffice. Instead, specific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith. [*Brown*, 978 F.2d at 592.]

Indeed, in *Freeman* itself, despite favorable findings by the district court about the defendants' dedication to the remedial effort, this Court suggested that "further proceedings" would be appropriate to determine whether there is "an affirmative commitment to comply in good faith with the entirety of a desegregation plan." 112 S. Ct. at 1450. The Eighth Circuit's decision here, however, was far easier, for the State did not even offer "protestations of an intent to comply in the future." Here, the State has consistently opposed and continues to oppose, often on contradictory grounds, virtually every aspect of the remedy in this case. The only component of the remedy for which the State is principally responsible, voluntary interdistrict transfers, has never been implemented on a meaningful scale. App. 20 n.10. In this Petition, the State argues that, with the task of desegregation in student enrollment admittedly incomplete and without regard to whether educational harms remain unremedied, its responsibility to help to fund hundreds of teachers, librarians and counselors and programs like full-day kindergarten and summer school should end because it has complied with certain of the court's orders for several years. It offered no proof whatsoever in the district court that might establish its good faith intentions to go forward on a more constructive basis.

II. THE COURT SHOULD NOT REVIEW FACTUAL CONCLUSIONS—CONCERNING THE NECESSITY OF THE SALARY RELIEF ORDERED IN THIS CASE TO THE SUCCESS OF THE REMEDY AND CONCERNING THE EFFECTS OF THE STATE'S CONSTITUTIONAL VIOLATION ON LOCAL SCHOOL DISTRICT REVENUES—THAT HAVE BEEN FINALLY RESOLVED AGAINST THE STATE IN EARLIER PROCEEDINGS

The State argues that this Court should review the Eighth Circuit's decisions affirming the district court's 1992 and 1993 salary orders because they are allegedly contrary to *Milliken II*, 433 U.S. 267, for two reasons: the State argues that court-ordered salary relief allegedly is not

tailored to correct the vestiges of segregation; and they argue that there was no showing that low salaries were directly caused by the State's constitutional violation. Pet. 24. Contrary to the State's argument, the lower courts' decisions do not conflict with *Milliken II* or any other precedent because the salary relief ordered is supported by findings of fact and substantial record evidence demonstrating that salaries near market levels are necessary to allow KCMSD to implement the desegregation remedy and that the District's inability to produce revenue sufficient to fund its basic operations (including salaries) was caused in part by the State's constitutional violation.

Desegregation funding for KCMSD salaries has been a long-standing component of the desegregation remedy; on no fewer than four separate occasions over the past seven years the lower courts have concluded that this relief was necessary to remedy the constitutional violations in this case. The district court first ordered such relief in 1987. While the State appealed other aspects of the same order, it did not challenge the court's approval of desegregation funds to bolster KCMSD's ability to attract and retain qualified employees to implement the court-ordered plan. In approving a settlement continuing such relief in 1990, Judge Clark again found, based on the evidence submitted during four days of testimony prior to the settlement, that maintaining adequate salaries was "essential to comply with the court's desegregation orders." July 23, 1990 Order at 6. Again in 1992, after a four-day hearing, the district court found that without continuing salary relief KCMSD would "not be able to implement" the desegregation plan. App. 86. On appeal, "[t]he State [made] no claims that the district court's findings of fact [were] clearly erroneous," App. 23, and the Eighth Circuit affirmed. App. 26-27. Again in 1993, the district court took extensive evidence and again concluded that salary relief was "a necessary component of the desegregation program." The Eighth Circuit again affirmed this finding. App. 31. There is no basis for granting certiorari

now to review this unchallenged finding, which is dispositive of the State's second stated issue.[14]

The State attempts now to turn this long-resolved, fact-specific issue into an error of law. Pet. 23-24. The State claims there is no "legal basis" for allowing desegregation funds to be used to pay salaries for "non-instructional personnel." Pet. 25. The principal legal basis for such relief, however, just like that for paying adequate salaries to teachers, is its necessity to "remedy the vestiges of segregation" in KCMSD. App. 23. The lower courts have repeatedly found that maintaining adequate salaries is essential to recruiting the personnel needed to implement the remedy and, on the basis of extensive evidence, rejected the State's purported distinction between instructional and non-instructional personnel. App. 90, 104. The State now seeks to transform this narrow factual dispute, which it lost twice below, into a legal issue meriting this Court's review. It is not.

The unique funding arrangement for this remedy, affirmed by this Court, also underscores both why the salary relief ordered in this case was necessary and why it poses no significant legal question meriting this Court's review. As this Court has recognized, by 1987, when the district court first ordered salary relief in this case, "it was clear that KCMSD would lack the resources to pay for its . . . share of the desegregation cost." 495 U.S. at 41. As a result, the lower courts have approved tax increases to fund KCMSD's share of desegregation costs and this Court has affirmed such extraordinary measures in the unique circumstances of this case. *Id.* However, this tax increase, whose proceeds go to the District's desegregation

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[14] *See supra* note 9. This Court also has repeatedly stressed the considerable deference owed to the lower courts' exercise of their equitable powers to remedy past discrimination because they have "firsthand experience with the parties and [are] best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 6).

budget, has left the District's regular operating budget capped at a rate about one-half that of surrounding districts. This unique circumstance—with which, after countless days of testimony, Judge Clark is intimately familiar—makes it impossible for KCMSD to pay salaries anywhere near market levels without using "desegregation" funds. This unusual situation, already once reviewed by this Court, is yet another reason this case does not again merit reconsideration.

Finally, the petition simply ignores the Eighth Circuit's other independent and fact-specific basis for affirming the salary relief. KCMSD's inability to produce adequate revenue to support its basic operations (including adequate salaries) was caused in part by the State's constitutional violation. App. 26, 30. The lower courts have concurred in this finding three times. App. 26, 30; 855 F.2d at 1305. Thus, the State is incorrect in claiming that the lower courts have not found "that low district-wide salaries . . . flow from any earlier constitutional violation by the State." Pet. 24. The district court found and the Court of Appeals agreed that KCMSD's inability to raise the funds necessary to provide adequate salaries by itself was in part the result of the State's constitutional violation. Again, the State does not contend that this Court should disturb these findings.

The truth of the matter is that the salary orders before the Court are concerned almost exclusively with the complex details of how to maintain a staff adequate to the challenge of implementing a voluntary desegregation plan in a school district physically, fiscally and educationally ravaged by decades of State-mandated segregation. The working out of these details is committed to the fact-finding authority and sound discretion of the lower courts. Nothing in these orders presents an important issue of law for this Court's consideration.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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